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No. 02-0560

In The

Supreme Court of the United States

COUNTY OF WASHOE, NEVADA;
RICHARD KIRKLAND; and RAY WRIGHT,

Petitioners,

v.

MICHELLE GIBSON,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Ninth Circuit properly apply the law stated in *Farmer, Canton,* and *Heller* to determine that the multiple deficiencies in the County's unique Jail policies and employee training were some evidence, for purposes of summary judgment, that the County was deliberately indifferent to the medical needs of mentally ill detainees, causing injury to respondent's decedent?

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STATEMENT OF FACTS

On February 3, 1996, respondent's husband Stephen Gibson (age 39), while exhibiting the symptoms of his previously diagnosed mental disorder, was arrested, and detained in chains for several hours in the Washoe County Jail without receiving any medical evaluation or treatment. During his incarceration, his manic behavior provoked several physical confrontations with deputies, which culminated in a final struggle causing him to suffer a fatal heart attack. His survivors' civil rights action under 28 U.S.C. §1983 was dismissed by summary judgment in the district court before trial occurred. The pertinent facts are derived from depositions, witness statements, affidavits and exhibits obtained during pretrial discovery.

In 1996, Stephen Gibson had a history of serious mental illness, having been diagnosed as a bi-polar manic depressive, which caused him to suffer very sudden and bizarre personality changes, which could occur within minutes. Excerpts of Record (E.R.) pp. 13-18. During manic episodes, such persons can engage in aberrant conduct which often attracts the attention of police agencies. But bi-polar depressives do not react well to authority figures; thus, their affliction creates the potential for explosive interaction with police officers. However, such symptoms can be readily controlled and treated in mental health facilities, and Stephen had been hospitalized and successfully treated several times previously by a psychiatrist in Reno, Nevada. E.R. p. 39.

On January 31, 1996, Stephen entered an acute manic phase of his illness, leading his wife Michelle to seek help from the hospital and Stephen's psychiatrist, who subsequently called "911," requesting that Stephen be picked up

and transported to the hospital on an emergency involuntary commitment basis. E.R. pp. 19-22. Subsequent calls caused four dispatches to be broadcast over the local area police frequencies, describing Stephen with the last two directing that officers attempt to locate him for emergency hospital commitment. *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175, 1181 (9th Cir. 2002).

On February 3, 1996, at 3:03 a.m., Stephen attracted the attention of two sheriff's deputies by his bizarre behavior, who subsequently arrested him for driving under the influence, although one deputy acknowledged that he did not smell alcohol on his person. The deputies also found prescription drug bottles in Stephen's vehicle. When the deputies notified dispatch of Stephen's identity, they were not informed of the outstanding request that he be transported to the mental health facility for an emergency commitment. Stephen was initially compliant, but during transport he began to act irrationally. *Gibson, supra*, 290 F.3d 1175, 1181-82; E.R. pp. 143-144.

Upon arrival at the Washoe County Jail, a deputy handed the prescription pill bottles to the nurse employed by the Jail, who recognized the medications as designed to treat mental illness. *Gibson, supra*, 290 F.3d at 1182. Subsequently, as described in the petition, a series of physical confrontations occurred between the manic Stephen and various sheriff's deputies. However, contrary to the implication in the petition, Stephen was not constantly combative during the entire time of his detention. His mood and demeanor frequently changed from violent and combative to passive, in the words of one deputy, "almost like a light switch". *Gibson, supra*, 290 F.3d at 1189, n.13; E.R. pp. 169, 183-185, 189-193. Although Stephen was compliant and non-combative for over two

hours in the holding cell, neither the jailers nor the nurse conducted an evaluation of him despite possession of his psychotropic medications and knowledge of his disturbed behavior. At 6:00 a.m., almost three hours after his arrest, Stephen again slipped out of his chain restraint, which precipitated the final confrontation in which the frantic Stephen was doused with pepper spray and physically overwhelmed by six officers. While pinned in a prone position by the weight of three deputies, he stopped struggling and turned blue. *Gibson, supra*, 290 F.3d at 1182-1183; E.R. pp. 178-185, 192-194, 203-207, 213-242. Medical efforts to revive him were unsuccessful and he was pronounced dead at a local hospital. E.R. pp. 195-199.

Subsequently, two medical experts agreed that Stephen suffered from arteriosclerotic coronary disease which made him vulnerable to myocardial ischemia, and was suffering a hyperexcitable or manic state which precipitated the confrontation with the Jail deputies increasing the risk of cardiac arrhythmia. E.R. pp. 243-270. The County's own medical expert concluded that "but for" the struggle with the deputies Stephen would be alive today. E.R. pp. 248-270. In the opinion of a forensic pathologist, Stephen's acute manic symptoms when brought into the Washoe County Jail constituted a medical emergency, but he was never medically evaluated during his detention. E.R. 244.

As emphasized in the Ninth Circuit opinion, it was "well-known" to Washoe County that its Jail housed "the second or third" largest number of mentally disturbed individuals in the State of Nevada. *Gibson, supra*, 290 F.3d at 1191. To address that acknowledged fact, the Jail employed not only a nurse to medically evaluate all detainees, but it also obtained the services of a full-time mental health professional through an agreement with the

State mental health division. However, in 1995, after petty personality conflicts developed, the Jail discontinued using the mental health professional and did not refill that position for four years. *Gibson, supra*, 290 F.3d at 1184. As a result of this deliberate choice among alternatives by the County, the Jail was unprepared to recognize and address the mental health needs of its detainees when Stephen Gibson arrived in 1996.[1]

Although written Jail procedures mandated medical screening of arriving inmates, it contained an exception providing that "[t]he medical screening *will be delayed* if the inmate is combative, uncooperative or unable to answer questions due to intoxication" (emphasis added). *Gibson, supra*, 290 F.3d at 1189. Since victims of manic mental illness are commonly combative and uncooperative, an entire class of mentally ill detainees was automatically denied prompt medical evaluation solely because of their symptoms. *Gibson, supra*, 290 F.3d at 1189. According to the successor Washoe County Sheriff, in a recent newspaper article:

> Today, people booked at the Washoe County Jail face a revised system. And Sheriff Dennis Balaam responded with an adamant "yes" when asked if the changes at the jail resulted from Gibson's death and subsequent lawsuit.
>
> Assistant Sheriff Lee Bergevin said when people are brought in, "they are still given a

[1] "The mental health evaluation service resumed in 1999 after, in Sheriff Kirkland's words, the Sheriff's Department 'patch[ed] up those bad feelings.'" *Gibson, supra*, 290 F.3d at 1184.

medical evaluation even when they are acting out."[2]

REASONS FOR DENYING THE PETITION

I.

CITING NO CONFLICT AMONG THE CIRCUITS, THE PETITION ARGUES ONLY THAT THE NINTH CIRCUIT ERRONEOUSLY APPLIED ESTABLISHED RULES OF LAW TO THE UNIQUE FACTS IN THIS CASE.

In each section of its petition, the County argues that the Ninth Circuit's conclusions "conflict" with the decisions of this Court. It does not assert that the Ninth Circuit utilized wrong legal precedents or adopted entirely new principles in conflict with other federal circuits. The County simply contends that the Ninth Circuit misapplied properly stated rules of law to the facts of this case – an asserted error for which certiorari is "rarely granted." Sup. Ct. Rule 10. Granting of the writ is not warranted merely to review the evidence or inferences to be drawn from the evidence. *General Talking Pictures Corporation v. Western Electric Company*, 304 U.S. 175, 178, 58 S. Ct. 849, 851, 82 L.Ed. 1273 (1938).

The petition also ignores the interlocutory nature of the Ninth Circuit decision and overstates its purported detrimental effect on County Jail operations. The unanimous

[2] The newspaper article from *Reno Gazette Journal*, September 2, 2002, entitled "Washoe Inmate Lawsuit Moves On" is not a part of the record below, but it has been lodged with the court for its consideration.

panel did not impose legal liability on Washoe County. It merely reversed one portion of the district court's summary judgment, and remanded for further proceedings. The panel concluded that the deficiencies in the patchwork of jail policies existing in 1996 were evidence supporting two potential theories of County liability under established law. The issues tendered in the petition are controlled by the unique facts existing in 1996, and because the County has since changed its Jail policies, the Ninth Circuit decision poses no ongoing threat to effective jail management, as asserted in the petition. The issues raised are fact-specific, and as discussed below, the Ninth Circuit decided those issues correctly in any event.

II.

THE NINTH CIRCUIT CORRECTLY APPLIED THE RULES STATED IN *FARMER*, *CANTON*, AND *HELLER*, TO CONCLUDE THAT SOME EVIDENCE EXISTED THAT THE JAIL'S POLICIES WERE DELIBERATELY INDIFFERENT TO THE MENTAL HEALTH NEEDS OF DETAINEES AND CAUSED INJURY TO RESPONDENT, PRECLUDING SUMMARY JUDGMENT.

A. Deliberate Indifference: In describing the two paths to potential county liability, the Ninth Circuit cited the settled principles announced in *Monell*,[3] *Bryan County*,[4]

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[3] *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978).

[4] *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 137 L.Ed.2d 626 (1997).

Canton,[5] and applied the more stringent Eighth Amendment "deliberate indifference" standard of *Farmer*[6] to this Fourteenth Amendment pretrial detention case. Based on the evidence that the Jail regularly detained persons suffering mental illness requiring prompt medical attention, the panel concluded that a jury could find (on an objective basis) that the County was deliberately indifferent to the constitutional rights of those detainees through its policy of refusing any medical evaluation or assistance to detainees who were combative or uncooperative, which are common symptoms of some mental illnesses. Moreover, the panel found evidence that the County was subjectively aware of this need to provide mental health care and deliberately chose, for "trivial and arbitrary" reasons, to suspend the agreement for the services of the mental health professional, knowingly creating a gaping hole in the system needed to identify, evaluate, and treat mentally ill detainees. This analysis by the Ninth Circuit focused precisely on the elements established in *Farmer* and related decisions for imposing municipal liability under Section 1983.

The County, in its petition, asks this Court to draw other inferences from the evidence. It perceives no deliberate indifference in failing to give medical attention to a combative detainee, arguing that its policy was reasonable (Petition, p. 15). But Mr. Gibson was not combative the entire time he was detained. There were no follow-up procedures. An initially combative detainee effectively

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[5] *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 103 L.Ed.2d 412 (1989).

[6] *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L.Ed.2d 811 (1994).

forfeited his right to prompt mental health care. There were also no fall-back procedures, such as telephoning a mental health agency for advice about an uncooperative inmate. All combative detainees were treated as obnoxious drunks, with pepper spray and brute force if necessary. As emphasized by the Ninth Circuit, manic-phase depressives are often combative and uncooperative. Under the Jail's policy, manic detainees were denied their constitutional right to reasonable medical care because they were exhibiting the symptoms of their illness. There is nothing outrageous in the Ninth Circuit's conclusion that a jury could find such a policy to be deliberately indifferent to detainees' rights.

Under its second route to municipal liability, the Ninth Circuit panel cited *Canton*, and applied its requirements that a county custom or policy amounting to deliberate indifference was the moving force behind a county employee's violation of Mr. Gibson's constitutional rights. Under the criteria of *Farmer*, the panel found evidence that the Jail nurse (who possessed Mr. Gibson's psychotropic drugs and was aware of his irrational behavior) was deliberately indifferent to his right to medical assistance, which arguably resulted from the County's deliberate or conscious failure to train her to confront such foreseeable emergencies or seek other assistance. The County in its petition again argues that depriving mentally disabled detainees of any evaluation or treatment is not deliberate indifference, but reasonable practice. Since other inferences are possible, the Ninth Circuit's factual conclusions were supported by the record and derived under properly stated law.

B. Systemic Deficiencies: Citing *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571, 89

L.Ed.2d 806 (1986), the County complains that the Ninth Circuit imposed potential municipal liability when the individual officer defendants were exonerated. Although the individual defendants were exonerated, the Ninth Circuit found evidence for a jury to conclude that the Jail nurse, a County employee not named as a defendant, violated Mr. Gibson's right to reasonable medical treatment. *Heller* does not require a victim to name the individual employee as a defendant in order to recover from the municipality responsible for the employee's conduct. The Ninth Circuit's opinion thus does not conflict with *Heller*.

Heller stands for the obvious proposition that there can be no municipal liability if the victim's constitutional rights were not violated. *Heller* involved injuries from a struggle with one police officer. Because that officer was exonerated from using excessive force, there was no constitutional injury to attribute to the municipality. But in *Owen v. City of Independence*, 445 U.S. 622, 651, 100 S. Ct. 1398, 1416, 63 L.Ed.2d 673 (1980), this Court expressly recognized that constitutional "systemic" injuries can result from the interactive behavior of several employees, not from the conduct of any single individual. Under the Ninth Circuit's view of the evidence, Stephen Gibson was "passed along" through a series of County employees in a jail system totally unprepared to recognize and treat his mental illness. Contrary to the characterization tendered in the petition, Washoe County was not found potentially liable because it failed to give medical attention to a combative inmate. It faces potential liability for deliberately maintaining a jail system which it knew was utterly unprepared to identify and handle the many mentally ill and often uncooperative individuals that it

regularly detained. Even if no single individual violated his constitutional rights, there was evidence that the system was defective and constitutional injury occurred under an *Owen* analysis. Under either theory (the indifferent nurse or the deficient system), the Ninth Circuit's conclusion conforms to the law established by this Court.

C. Causation: Because this case terminated in the district court with a summary judgment, no court has yet reached the question of the measure of damages available to respondent. The Ninth Circuit found that the County reacted to Stephen Gibson's serious illness by shackling him for hours and locking him in a cell, showering him with pepper spray, dragging him through the corridor, and immobilizing him with deputies, inevitably causing psychological and physiological stress far more substantial than suffered by the jailed victim in *Canton*. *Gibson, supra*, 290 F.3d at 1192. For purposes of summary judgment, those injuries were closely related with a direct causal link to the jail policies, satisfying the damage element necessary to establish a §1983 claim. Whether respondent can prove that the Jail policies caused Mr. Gibson's *death* is an unresolved question for future proceedings.

CONCLUSION

Since there is no reason for this Court to conduct another review of the evidence under the well-established law properly applied by the Ninth Circuit, respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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